

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA

Plaintiff,

v.

DEVAL HATCHER,

Defendant.

Case No. 2:23-cr-00012-NJK

**Order**

[Docket No. 12]

Pending before the Court is Defendant's motion to dismiss for violation of nondelegation doctrine. Docket No. 12. The United States filed a response, Docket No. 8, and Defendant filed a reply, Docket No. 14. The motion is properly resolved without a hearing. *See* Local Rule 78-1. For the reasons more fully discussed below, Defendant's motion is **DENIED**.

**I. BACKGROUND**

Defendant is charged with operating a vehicle in excess of the posted speed limit in Red Rock National Conservation Area on September 2, 2022, all in violation of 43 C.F.R. § 83651.1-3(a).<sup>1 2</sup> Docket No. 1 at 1. 43 C.F.R. § 83651.1-3(a) was promulgated by the Secretary of the Interior pursuant to authority delegated to her under 43 U.S.C. § 1733(a).<sup>3</sup>

<sup>1</sup> Defendant was originally charged with resisting issuance of a citation in violation of 43 C.F.R. § 8365.1-4(a)(4) and exceeding posted speed in violation of 43 C.F.R. § 83651.1-3(a). Docket No. 7 at 2. The United States dismissed the charge of resisting issuance of a citation. *See* Docket No. 4-1. The criminal information in this case only charges Defendant with violating 43 C.F.R. § 83651.1-3(a). *See* Docket No. 1.

<sup>2</sup> 43 C.F.R. § 83651.1-3(a) provides that "[w]hen operating a vehicle on the public lands, no person shall exceed posted speed limits, willfully endanger persons or property, or act in a reckless, careless or negligent manner."

<sup>3</sup> 43 U.S.C. § 1733 provides, in part, that "[t]he Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon. Any person who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than \$1,000 or imprisoned no more than twelve months, or both."

1 Defendant submits that the citation against him should be dismissed because only Congress  
2 can make acts criminal. Docket No. 12 at 2. Defendant further submits the regulation under which  
3 he is charged was “promulgated by the executive branch instead of the legislative branch pursuant  
4 to an unlawfully broad and limitless delegation of power,” and is therefore unconstitutional. *Id.*  
5 The United States responds that “the delegation of authority by Congress to the Secretary of the  
6 Interior pursuant to 43 U.S.C. § 1733 does not run afoul of the non-delegation doctrine.” Docket  
7 No. 8 at 3.

## 8 **II. STANDARDS**

9 The Constitution of the United States vests the power to legislate in Congress. U.S. Const.  
10 art. 1, § 1. Under this constitutional structure, “Congress generally cannot delegate its legislative  
11 power to another Branch.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989). This restriction  
12 is commonly known as the nondelegation doctrine. “Under modern precedent, this is an  
13 exceedingly modest limitation.” *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266 (9th Cir. 2021).  
14 Supreme Court precedent recognizes that “the Constitution does not deny to the Congress the  
15 necessary resources of flexibility and practicality” such that “Congress may obtain the assistance  
16 of its coordinate Branches – and in particular, may confer substantial discretion on executive  
17 agencies to implement and enforce the laws.” *Gundy v. United States*, 139 S. Ct. 2116, 2123  
18 (2019) (internal quotations and citations omitted). “So long as Congress lays down by legislative  
19 act an intelligible principle to which the person or body authorized to act is directed to conform,  
20 such legislative action is not a forbidden delegation of power.” *Touby v. United States*, 500 U.S.  
21 160, 165 (1991) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).  
22 “This means that a delegation is permissible if Congress has made clear to the delegatee the ‘general  
23 policy’ he must pursue and the ‘boundaries of his authority.’” *Melgar-Diaz*, 2 F.4th at 1267  
24 (quoting *Gundy*, 139 S. Ct. at 2129). Determining whether Congress provided an intelligible  
25 principle “requires construing the challenged statute to figure out what task it delegates and what  
26 instructions it provides.” *Gundy*, 139 S. Ct. at 2123 (citing *Whitman v. Am. Trucking Ass’ns, Inc.*,  
27 531 U.S. 457, 473 (2001)).  
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### III. DISCUSSION

Defendant submits that 43 U.S.C. § 1733(a) lacks an intelligible principle to guide the Secretary in promulgating regulations.<sup>4</sup> Docket No. 12 at 2-3. The United States cites *United States v. Kittel*, 2021 WL 3823185 (D. Or. 2021), for the proposition that courts in the Ninth Circuit have found a statute similar to 43 U.S.C. § 1733(a) to contain an intelligible principle, Docket No. 8 at 5. The *Kittel* court reached its conclusion by adopting the reasoning in *United States v. Cassiagnol*, 420 F.2d 868, 876-77 (4th Cir. 1970). *Kittel*, 2021 WL 3823185 at \*4-\*5. The United States also adopts the reasoning of *Cassiagnol* in its brief. Docket No. 8 at 5-6.

*Cassiagnol* involved antiwar protestors at the Pentagon challenging their convictions for violating various General Service Administration (“GSA”) regulations promulgated under 40 U.S.C. § 318. 420 F.2d at 875-76. The *Cassiagnol* defendants “allege[d] that the broad grant of authority to GSA exceeds the permissible right of Congress to delegate its own authority.” *Cassiagnol*, 420 F.2d at 876. The *Cassiagnol* court found that the statute limited GSA’s authority

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<sup>4</sup> Defendant also submits that 43 U.S.C. § 1733(a) violates the principle that “only the people’s elected representatives in Congress have the power to write new federal criminal laws.” Docket No. 12 at 3-4. (quoting *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1059-60 (9th Cir. 2020)). *Valenzuela Gallardo* addressed whether the Board of Immigration Appeals’ interpretation of a statute is entitled to *Chevron* deference and how *Chevron* deference interacts with other aspects of criminal law. *Valenzuela Gallardo*, 968 F.3d at 1059. Defendant briefly discusses *Valenzuela Gallardo* before concluding that “[i]f the Ninth Circuit has concerns over the executive branch providing interpretations of a statute, than the executive branch creating criminal statutes can only increase the constitutional problems present here.” Docket No. 12 at 3-4. The United States did not respond to this portion of Defendant’s brief. See generally Docket No. 8.

The Supreme Court has examined whether a statute making violation of regulations a criminal offense violates the separation of powers. See *United States v. Grimaud*, 220 U.S. 506 (1911). More recently, the Supreme Court seemingly assumed that Congress could properly authorize the Executive Branch to promulgate regulations that contemplate criminal sanctions. Cf. *Touby*, 500 U.S. at 165-66 (declining to address whether “regulations that contemplate criminal sanctions” promulgated under a statutory delegation of authority require “more specific guidance” than an intelligible principle because the challenged statute “passe[d] muster even if greater congressional specificity is required in the criminal context”). Defendant does briefly analyze how *Grimaud* would affect the separation of powers question. His analysis, however, consists primarily of the conclusory statement that “[*United States v. Davis*, 139 S. Ct. 2319 (2019)] would abrogate any prior ruling holding the legislature does not have a monopoly over making acts criminal, including *Grimaud*.” Docket No. 14 at 5. *Davis* addressed whether the residual clause of a congressionally drafted criminal statute was unconstitutionally vague. *Davis*, 139 S.Ct. at 2323-24. Defendant at no point clarifies how cases focusing on *Chevron* deference and constitutional vagueness inform whether a statute violates the separation of powers. The Court need not address undeveloped arguments. See, e.g., *Kor Media Grp., LLC v. Green*, 294 F.R.D. 579, 582 n.3 (D. Nev. 2013).

1 to “establish regulations only as to government property under its charge and control.” *Id.*  
 2 Similarly, the *Cassiagnol* court noted that the general policy GSA was to pursue was to promulgate  
 3 “‘needful rules and regulations’ to maintain and protect such property and ensure its use for the  
 4 authorized purpose.” *Id.* (quoting 40 U.S.C. § 318a). It concluded that such a broad grant of  
 5 authority was appropriate because of the “wide variety” of buildings under GSA control. *Id.*  
 6 Accordingly, the *Cassiagnol* court found “40 U.S.C. § 318 to be a constitutional delegation of  
 7 administrative authority to the Administrator of GSA.” *Id.* at 377.

8 Defendant attacks the United States’ reliance on *Cassiagnol* on several grounds.  
 9 Defendant first submits that *Cassiagnol* lacks persuasive value because it fails to address the  
 10 “Supreme Court’s unequivocal[] declaration [that] ‘only the people’s elected representatives in the  
 11 legislature are authorized to make an act a crime.’” Docket No. 14 at 5 (quoting *Davis*, 139 S. Ct.  
 12 at 2325). This submission is a variant of Defendant’s separation of powers argument discussed  
 13 above. The Court declines to address this argument for the reasons previously stated.

14 Defendant further submits that *Cassiagnol* is of little persuasive value because “it did not  
 15 have an opportunity to consider the more recent denunciations and abrogations of the  
 16 nondelegation clause.” Docket No. 14 at 5. Defendant is correct that *Cassiagnol* predates much  
 17 of the Supreme Court’s nondelegation jurisprudence. The Fourth Circuit, however, has recently  
 18 found *Cassiagnol*’s reasoning decisive in a nondelegation challenge.

19 In *United States v. Moriello*, 980 F.3d 924 (4th Cir. 2020), the Fourth Circuit considered  
 20 whether 40 U.S.C. § 1315, the modern successor to the statute at issue in *Cassiagnol*, violated the  
 21 nondelegation doctrine.<sup>5</sup> *Moriello* reaffirmed *Cassiagnol*’s conclusion that “it is reasonable and  
 22 constitutional to delegate to the agency charged with maintenance and protection of government  
 23 property the right to fix minimum acceptable conduct thereon.” *Moriello*, 980 F.3d at 932 (quoting  
 24 *Cassiagnol*, 420 F.2d at 876-77). Indeed, the *Moriello* court concluded that 40 U.S.C. § 1315  
 25 provided a narrower delegation of authority than 40 U.S.C. § 318a. *Id.* at 933. This is because the

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 27 <sup>5</sup> 40 U.S.C. § 1315(c)(1) states that “[t]he Secretary [of Homeland Security], in consultation  
 28 with the Administrator of General Services, may prescribe regulations necessary for the protection  
 and administration of property owned or occupied by the Federal Government and persons on the  
 property.”

former “delegated the authority to ‘make *all needful rules and regulations* for government of the property’” under GSA control whereas the latter “specifies that the rules must be ‘*for the protection and administration of property* owned or occupied by the Federal Government.’” *Id.* (quoting 40 U.S.C. §§ 318a (2002), 1315(c)) (emphasis added). *Cassiagnol*, therefore, is still persuasive law.

Defendant further submits that *Cassiagnol*’s reasoning regarding the limitation of delegated authority fails when applied to the Bureau of Land Management (“BLM”) because it manages significantly more property than the GSA. Docket No. 14 at 5-6. Defendant fails to explain, however, how the government’s interest in administering its property is substantively changed by the amount of property at issue. Indeed, given that the BLM manages such a wide variety of property relative to the GSA, the logic of *Cassiagnol* suggests that Congress could delegate even more discretion to the BLM than to the GSA.<sup>6</sup> *Cf. Cassiagnol*, 420 F.2d at 876.

The Court finds the reasoning from *Cassiagnol* and *Moriello* persuasive. 43 U.S.C. § 1733(a) directs that “[t]he Secretary [of the Interior] shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon.” Much like the statute at issue in *Moriello*, § 1733(a) requires regulations be for “the management, use, and protection of the public lands.” The Secretary’s regulatory authority is further narrowed by Congressional declarations regarding the promulgation of regulations and the policy and management objectives those regulations should pursue. *See* 43 U.S.C. §§ 1701(5), (8), (12).<sup>7</sup> Additionally, § 1733(a) limits the Secretary’s

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<sup>6</sup> Defendant’s final submission as to why *Cassiagnol* and *Kittel* are unpersuasive is, at bottom, an argument that the relevant statutes lacked an intelligible principle. *See* Docket No. 14 at 6-7. *Compare id. with* Docket No. 12 at 7. The Court declines to re-adjudicate those cases here.

<sup>7</sup> 43 U.S.C. § 1701(5) states that, “in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking.”

43 U.S.C. § 1701(8) directs that

“the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish

1 authority to the statutorily defined “public lands.” *See* 43 U.S.C. § 1702(e).<sup>8</sup> Considering the  
 2 reasoning in *Cassiagnol* and *Moriello*, and because “Congress has made clear to the delegee the  
 3 ‘general policy’ [s]he must pursue and the ‘boundaries of [her] authority,’” *Melgar-Diaz*, 2 F.4th  
 4 at 1267 (internal citation omitted), the Court finds that 43 U.S.C. § 1733(a) is not an  
 5 unconstitutional delegation of legislative power.

#### 6 IV. CONCLUSION

7 For the reasons more fully discussed above, Defendant’s motion to dismiss for violation of  
 8 nondelegation doctrine is **DENIED** in part and **DENIED** without prejudice in part. Docket No.  
 9 12. Defendant’s nondelegation challenge is **DENIED**. Defendant’s separation of powers  
 10 challenge is **DENIED** without prejudice. Any renewed motion raising a separation of powers  
 11 argument must be submitted no later than February 23, 2023.

12 IT IS SO ORDERED.

13 Dated: February 16, 2023

14   
 15 Nancy J. Koppe  
 16 United States Magistrate Judge  
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22 and wildlife and domestic animals; and that will provide for outdoor recreation and  
 23 human occupancy and use.”

24 43 U.S.C. § 1701(12) requires that “the public lands be managed in a manner which  
 25 recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the  
 public lands including implementation of the Mining and Minerals Policy Act of 1970 ... as it  
 pertains to the public lands.”

26 <sup>8</sup> “The term ‘public lands’ means any land and interest in land owned by the United States  
 27 within the several States and administered by the Secretary of the Interior through the Bureau of  
 Land Management, without regard to how the United States acquired ownership, except (1) lands  
 28 located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts, and  
 Eskimos.” 43 U.S.C. § 1702(e).